

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**GRILL CONCEPTS SERVICES, Inc.,
d/b/a The Daily Grill,**

Employer

and

UNITE HERE LOCAL 11,

Petitioner

Case No. 31-RC-209589

**PETITIONER’S STATEMENT
IN OPPOSITION TO EMPLOYER’S
REQUEST FOR REVIEW OF
DECISION AND CERTIFICATION
OF REPRESENTATIVE**

Union/Petitioner UNITE HERE Local 11 (“Union”) hereby files this statement opposing Employer Grill Concepts Service, Inc. (“Employer”)’s Request for Review of the Regional Director’s July 24, 2018 Decision and Certification of Representative.

I. Introduction

The instant Request for Review is the latest in a string of baseless attempts by the Employer to have a fairly administered mail ballot election set aside. During the election period, Union organizers engaged in lawful electioneering during visits to bargaining unit employees’ homes. The Union sought to ensure employees received their ballots (or could timely obtain a replacement ballot if they had not), confirm employees were aware of the requirements for casting a valid ballot, and encourage them to vote for the Union. As the Hearing Officer found, there is no evidence that the Union and/or third parties ever threatened employees or engaged in any other coercive conduct during the home visits. (Hearing Officer’s Report at p. 7, located at

RFR Exh. 7.) Nor is there evidence that the Union or third parties ever took possession of any of the ballots or that employees opened their ballots or voted in the presence of Union representatives. (*Id.* at pp. 4-5, 8.) As reviewed below, the Employer's Request for Review rehashes matters the Board has already resolved, fails to identify any objectionable conduct, and mischaracterizes the record evidence.

II. PROCEDURAL HISTORY

On November 8, 2017, UNITE HERE Local 11 petitioned for an election to represent all non-supervisory employees of Grill Concepts dba the Daily Grill ("the Employer") at its restaurant at 5410 West Century Boulevard, Los Angeles, CA 90045. Based on evidence presented at a hearing held November 20, 2017 and supplemental briefing, the Regional Director determined that, because the largely part-time workforce was "scattered" in the sense that their work schedules varied such that they were not present at a common location at common times, an election by mail ballot was appropriate. (Decision and Direction of Election at pp. 3-5, located at RFR Exh. 3.) The election was conducted from December 7 through 21, 2017, with a majority of employees voting to unionize.

During the election period, the Employer filed an unfair labor practice charge against the Union alleging that the Union coerced employees during visits to workers' homes. (See Case 31-CB-211892.) The Regional Director attempted to investigate but ultimately dismissed the charge on February 5, 2018, citing the Employer's failure to cooperate in the presentation of witnesses. The Employer appealed the dismissal. On March 30, 2018, the NLRB Office of Appeals denied the Employer's appeal.

Shortly after the election, the Employer filed objections relating to the direction of a mail ballot election and alleging coercion by the Union in the course of home visits. (See RFR Exh.

4.) On April 11, 2018, the Regional Director issued a partial decision in which she overruled all objections related the mail ballot election, including the voiding of several unsigned ballots. (See RFR Exh. 5.) The Employer filed a Request for Review of the Regional Director's partial decision, which the Board denied on August 3, 2018. (See RFR Exh. 10.)

A Hearing Officer conducted an evidentiary hearing on April 23 to 25, 2018 concerning the Employer's remaining allegations regarding home visits. The Hearing Officer credited the testimony of Union organizer Sergio Sorza, who explained that the Union visited employees' homes to make sure that employees had an opportunity to cast their ballot. Sorza explained that the Union sought to ensure workers understood how to request a ballot if they had not received one in the mail, as indicated in the NLRB's Notice of Election.¹ (Tr. 469: 2-16.) He explained that the Union sought to ensure employees understood what steps were required for their ballot to be counted, including signing the back of the sealed envelope containing the signed ballot; offered to assist workers who lacked cars with transportation to the post office; and made substantive arguments in favor of unionization. (See Tr. 463:22-464:10; 469:17-470:4.) In selecting employees to visit, the Union focused on workers who previously expressed support for unionization, including by signing authorization cards. (Tr. 484:17-485:2.)²

Despite putting on eight witnesses whose testimony the Hearing Officer credited, the Employer presented no evidence of any objectionable conduct. The Hearing Officer summarized the evidence as follows:

[T]he evidence shows that the Union and/or third parties did not engage in objectionable conduct during the home visits. All nine employees testified that the Union and/or third

¹ The NLRB's Notice of Election indicated that employees who had not received their ballot by Saturday, December 9, 2017 "should communicate immediately with the National Labor Relations Board" via a specified phone number. (See Notice of Election, located at RFR Exh. 2 at p.10; presented at the hearing as Un. Exh. 1.)

² The Employer filed the entire hearing transcript as Exhibit 6 of its Request for Review.

parties did not threaten them. The Union and/or third parties discussed unionization with the employees and operated within the scope of soliciting support for the Union. The Union and/or third parties also asked the employees if they received their ballots, which is not unlawful conduct.

(Hearing Officer's Report at p. 7, located at RFR Exh. 7.) Accordingly, the Hearing Officer recommended that the outstanding objections be overruled.

The Employer filed exceptions to the Hearing Officer's report. In a Decision and Certification of Representative issued July 24, 2018, the Regional Director analyzed and overruled each exception. Among other points, the Regional Director rejected the Employer's allegation that the Hearing Officer did not give sufficient weight to employees' claims about their subjective feelings of discomfort regarding the Union's home visits, observing that the Board applies an objective test for determining whether conduct is objectionable. (Decision and Certification of Representative at pp. 5, 7-8, located at RFR Exh. 9.) On the basis of a majority of ballots cast, the Regional Director certified the Union as the exclusive representative of bargaining unit employees.

III. ARGUMENT

1. The Board has already ruled on issues raised in the Request for Review.

Much of the Employer's instant Request for Review rehashes the position it advocated in its previous Request for Review regarding this election: that the Regional Director should not have directed an election by mail ballot. The appropriateness of the mail ballot and related issues are the subject of two of the four policy issues it claims the Regional Director's ruling raises and three of the five areas it argues merit reconsideration of Board policy. (See instant Request for Review at pp. 12, 17.) As noted above, however, the Board has already considered and rejected the Employer's position opposing use of the mail ballot, stating in its August 3,

2018 Order denying the previous Request for Review that the Employer's request "raise[d] no substantial issues warranting review." (RFR Exh. 10.)

The remaining vaguely described policy issues noted by the Employer do not merit review. There is no cause to reconsider the Regional Director's supposed "disregard" of employee complaints, which the Hearing Officer and Regional Director in fact reviewed in extensive detail. (See Decision and Certification of Representative at p. 2-5.) Nor, as discussed below, is there any occasion to reject the Regional Director's decisions or reconsider Board rules concerning party contact with employees, as there was no misconduct to remedy.

2. The Employer relies on a handful of employees' subjective reactions to the Union's home visits, not facts evincing any objectionable conduct.

A bedrock principle of Board's election jurisprudence is that the test of whether a party's conduct is objectionable is not subjective, but "an objective determination of whether the conduct of a party to an election has the tendency to interfere with the employees' free choice." *Cambridge Tool & Mfg. Co., Inc.*, 316 N.L.R.B. 716, 716 (1995). "The Board has long held that the subjective reactions of employees are irrelevant to the question of whether there was in fact objectionable conduct." *Lake Mary Health & Rehabilitation*, 345 NLRB 544, 545 (2005). Yet the Employer points only to the subjective reactions of a handful of workers regarding the Union's home visits, not to any objectionable conduct.

It is well established that union agents may lawfully visit employees at their homes as part of their unionization efforts in both manual and mail ballot elections. *San Diego Gas & Elec.*, 325 NLRB 1143, 1149 (1998). As the Board has long recognized, because unions—unlike employers—do not typically have the ability to address employees in informal groups or control employees' working conditions, "not only do unions have more need to seek out individual employees to present their views, but more important, lack the relationship with employees to

interfere with their choice of representatives thereby.” *Plant City Welding & Tank Co.*, 119 NLRB 131, 133-34 (1957). Home visits by union representatives are “unobjectionable unless they are accompanied by threats or other coercive conduct.” *Longwood Security Servs., Inc.* 364 NLRB No. 50, slip op. at 3 (2016), citing *Canton, Carp’s Inc.*, 127 NLRB 513 fn. 3 (1960).

The Employer has pointed to no evidence that the Union made threats or engaged in other coercive conduct during the home visits. Instead of citing any actual misconduct, the Employer merely points to several employees’ negative subjective feelings about being visited at their homes. As the Hearing Officer accurately summarized, contrary to the Employer’s hyperbolic characterizations, the employees’ reactions reached only “a level of irritation”:

There is no evidence that in the record that the employees were fearful, or that the Union’s and/or third parties’ conduct during the home visits likely caused fear among employees in the voting unit. All nine of the employees testified that the Union and or/ third parties never threatened them. At most, the severity of the home visits only reached a level of irritation.

(Hearing Officer’s Report at p. 9.) The Employer also points to actions employees purportedly took in response to the home visits, such as avoiding the Union or complaining to the Employer. None of this testimony demonstrates any misconduct by the Union. As the Regional Director explained when reviewing some of the same testimony cited by the Employer here, even “[a]ssuming the employees’ behavior could be solely attributed to the Union’s home visits, the Employer provides no legal support for its claim that employees’ subjective reactions to the Union representatives’ lawful electioneering efforts transforms such conduct into objectionable coercive conduct.” (Decision and Certification of Representative at p. 5 (reviewing testimony of Stephanie Mendez and Kimberly Mendez); see also *id.* at pp. 7-8 (reaching similar conclusion with respect to testimony of Kurt Mann and Macey Sheets). The burden for overturning a

Board-administered election is a “heavy one,” and mere subjective sentiment does not come close to meeting it. *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000).

3. The Employer mischaracterizes the record to suggest misconduct that did not occur.

Several of the Employer’s mischaracterizations of the record were specifically addressed by the Hearing Officer and/or Regional Director. First, with respect to the Employer’s claim that the Union tried to “help” employees vote, the Hearing Officer concluded that the testimony was “equivocal” as to what any offers to help meant. The Hearing Officer observed that the testimony of the Employer’s employee-witnesses was vague or only “assumed” inappropriate intentions, and she credited the testimony of Union organizer Sergio Sorza, who explained that the Union simply offered to provide information to employees to ensure their ballots were counted and to assist those who lacked cars with the transportation to the post office. (Hearing Officer’s Report at p. 7, citing Tr. 37, 43, 128, 129, 463-64, 469-70, and Er. Exh. 1.) In any case, as the Hearing Officer summarized, “the testimony overwhelmingly establishes that regardless of what the employees and the Union subjectively understood ‘helping’ to mean, the ballots were never opened in the presence of the Union and/or third parties.” (*Id.*)

Second, the Regional Director specifically debunked the Employer’s misleading claim that “Union Representatives even entered Lucas Chim’s home without his knowledge or consent,” (Request for Review at p. 7), explaining that the record shows that the Union representatives were let in by a family member while Chim was asleep, and that Chim, once roused, proceeded to have a 45-minute conversation with them (though he could not recall where the conversation took place). (Decision and Certification of Representative at p. 8, fn. 4.; Tr. 88, 109.)

Third, with respect to the Employer's claim that Ashlynn Camberos had her ballot delivered to her mother's address because of concerns about the Union, the Regional Director explained that the reason Camberos' ballot was mailed to her mother's house was "unclear" because Camberos gave conflicting testimony on this point. (Decision and Certification of Election at p. 5; Hearing Officer's Report at p. 10, fn. 5; Tr. 199:21-200:1.)

III. Conclusion

For the reasons outlined herein the Union respectfully urges the Board to deny the Employer's Request for Review. If the Board determines to grant the Employer's request, the Union requests, consistent with Rule 102.67(h), that it be provided a full opportunity to brief the merits of the matters at issue.

Respectfully Submitted,

s/s Jeremy Blasi

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